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In the Supreme Court of the United States

OCTOBER TERM, 1960

MINNEAPOLIS GAS COMPANY AND METROPOLITAN UTILITIES DISTRICT OF OMAHA, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The orders of the Federal Power Commission (R. 368–397; R. 407–415) [1] are reported at 22 F.P.C. 164 and 523. The opinion of the court of appeals (Pet. 14–16) is reported at 278 F. 2d 870.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1960 (Pet. 16). Petitions for rehearing and for rehearing *en banc* were denied on June 10, 1960 (Pet. 24–25). The petition for a writ of certiorari was filed September 6, 1960. The jurisdiction

[1] "R." refers to the joint appendix filed in the court of appeals.

of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission's finding that a proposed expansion of facilities and service by a natural gas company was economically feasible and required by the public convenience and necessity was supported by the record.

2. Whether a rate-increase application filed by the natural gas company after the termination of the certification hearings, based on a prospective increase in the cost of gas supplies and a claimed right to a higher rate of return, required reopening of the hearings.

3. Whether the contention that the rate-increase application required reopening of the hearings, made for the first time in a reply brief in the court of appeals although the application had been filed before oral argument to the Commission, was barred by the provision of Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), foreclosing objections not presented to the Commission in an application for rehearing.

STATUTES INVOLVED

Sections 7(c), 7(e) and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, 717f, 717r, are set forth in the appendix to the petition (Pet. 26–29).

STATEMENT

Petitioners, two local natural gas distributors serving Minneapolis, Minnesota, and Omaha, Nebraska, purchase their supplies of gas from the inter-

state pipeline system of the Northern Natural Gas Company. They filed in the court below a petition seeking review of an order of the Federal Power Commission granting Northern certificates of public convenience and necessity for system extensions. The court below affirmed the Commission's order. The pertinent facts follow:

Northern's applications and the proceedings before the Commission. On January 12, 1959, Northern filed with the Commission two applications for certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f. In Docket No. G-17485, Northern sought authorization to extend its existing natural gas pipeline system beyond Minneapolis, Minnesota, by constructing and operating approximately 170 miles of pipeline to Duluth, Minnesota, and Superior, Wisconsin, in order to make available for the first time natural gas service to those cities and to 37 other communities located along the route of the proposed extension. In Docket No. G-17486, Northern sought authorization to construct and operate facilities to provide initial natural gas service to 303 communities in Nebraska, South Dakota, Iowa, Illinois, Wisconsin and Minnesota. The facilities proposed in the two applications included the main line extension to Duluth and Superior, main-line loops of the existing system, additional main-line compression, branch pipelines to the new communities, and town-border measuring stations. The original total estimated construction cost was approximately $115,000,000 (R. 364-365).

Petitioners (R. 306–311, 315–328) and numerous other interested parties[1] were permitted to intervene in the certificate proceedings, and hearings on the two applications were consolidated. The hearings commenced on April 20, 1959, and concluded on June 18, 1959, after 27 actual hearing days (R. 366). Northern presented evidence which showed that with estimated revenues, based on the rates it was then collecting from present customers, and the added costs of providing the new services, the expanded system *as a whole* would earn during the third year in excess of the 6½% rate of return which the rates were intended to produce (R. 149, 253, 254, 264–265 276, 277). Exhibits introduced by Commission staff witnesses supported Northern's showing of an estimated *system-wide* rate of return of 6½% (R. 150–156, 238–242, 297–299). In addition, Northern introduced evidence that the *incremental* rate of return on the new facilities, without reference to Northern's system-wide operations, would be somewhat short of 6½%, but would still represent a substantial return on its investment (R. 266, 278, 373–374).

The intermediate decision procedure was omitted, and oral argument was heard before the Commission on July 17, 1959 (R. 335). In the oral argument, reference was made to an application for a

[1] In addition to the State of Minnesota, the Public Service Commission of Wisconsin, and the Illinois Commerce Commission, which filed notices of intervention, the Federal Power Commission permitted the intervention of 47 parties (R. 366). The interveners included a number of existing utility customers of Northern and various distribution companies and municipalities seeking initial service from Northern.

rate increase Northern had filed after the hearing on the certificate applications had been closed (Pet. 7),[4] but no request was made to consolidate the two proceedings or to defer the certificate proceeding pending hearing on the new increased rates.

On July 31, 1959, the Commission issued its opinion and accompanying order in which it granted Northern's applications for certificates of public convenience and necessity for the construction and operation of the facilities to serve the 342 communities, upon the condition that 124 of the communities either make stated capital contributions or be eliminated (R. 377–378, 387–389).

The Commission found that, considering Northern's system as a whole, "its project will be feasible" particularly after the provision for contributions by communities on certain of the branch lines (R. 373–374, 377–378). The Commission further found that, with the capital contributions it was requiring, "it would appear that no undue burden will be placed on the present customers" (R. 379).

On August 27, 1959, petitioners filed a joint application for rehearing (R. 336). In this application, petitioners presented no objection based on the filing of

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[4] On June 26, 1959, eight days after the closing of the record in these proceedings, Northern filed a separate rate increase application, *Northern Natural Gas Company*, Docket No. G-19040. Part of the increase was attributable to Northern's efforts to obtain a rate of return of 6¾% instead of 6½%, and the balance was for prospective increases in the cost of gas purchased by Northern. The Commission set the increase for hearing and suspended it for the full statutory period, after which it went into effect subject to refund of any amounts not ultimately found justified.

the application for a rate increase by Northern in Docket No. G–19040 on June 26, 1959. Their attack was solely upon the economic feasibility of the project on the record then before the Commission. Specifically, petitioners requested that the capital contributions required by the Commission on certain of the branch lines be increased to defray more of the capital costs of providing the new services (R. 336–358).

On September 18, 1959, the Commission denied the application for rehearing, holding, *inter alia*, that there was no requirement that each service rendered by the utility produce revenues equivalent to those of the other services (R. 409); that the application by petitioners set forth no new facts or principles of law not fully considered by the Commission in its prior opinion; and that no change or modification of such opinion was warranted (R. 414).[4]

Proceedings in the court of appeals. On November 12, 1959, petitioners sought review in the United States Court of Appeals for the District of Columbia. Again, petitioners raised no question respecting the rate increase application filed by Northern with the Commission on June 26, 1959. Rather, they maintained, as they had on their motion for rehearing before the Commission, that on the record the project was not economically feasible (R. 2–12). In its answering brief (pp. 23–24), the Commission refuted petitioners' argument of lack of economic feasibility by relying, in

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[4] On petition of Northwestern Public Service Company, the Commission modified its prior order to permit construction of the facilities represented by the required capital contributions in lieu of making such contributions (R. 413–414).

part, on certain mathematical computations made from the evidence in the record on Northern's revenues and costs. In their reply brief (pp. 2–8), petitioners for the first time contended that the project was not economically feasible in the light of the costs shown in Northern's last rate increase application.

On May 13, 1960, the court of appeals affirmed the Commission's orders. It held, *inter alia*, that the various parts of a public utility system need not and cannot be equally profitable; that the record supported the Commission's finding of economic feasibility and its conclusion that the new service was required by the public convenience and necessity; and that the Commission properly weighed the interests that would be served against those that would be injured and did not strike an arbitrary balance (Pet. 14–16).

In petitions for rehearing and for a rehearing *en banc*, petitioners, maintaining that they had "no opportunity whatever * * * to be heard" by the Commission on the economic feasibility of the new service in the light of Northern's recent rate increase application, requested that judgment be reversed and the proceedings be remanded to the Commission for further hearings (Pet. 17–24). The petitions were denied on June 10, 1960 (Pet. 24–25).

ARGUMENT

The decision of the court below presents no broad legal question of public importance. It turns upon the particular facts of record and was entirely cor-

rect. What petitioners are here seeking is an opportunity to retry the matters before the Commission on an entirely different theory. We show below that that theory is invalid and, in any event, not available to petitioners since they failed to present it to the Commission in their petition for rehearing. In the circumstances there is no need for further review by this Court.

1. Both before the Commission and in their petition for review in the court of appeals, petitioners argued that there was insufficient evidence *in the record* to support the Commission's finding that Northern Natural Gas Company's proposed expansion project was "economically feasible", and that, hence, the Commission erred in concluding that the public convenience and necessity required the proposed services.[5] Specifically, petitioners maintained that the revenues from certain of the communities proposed to be served would so far fall short of meeting Northern's costs that there would result an undue financial burden upon petitioners. The evidence presented went to that question, and the Commission gave it full consideration.[6]

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[5] No question was raised as to the adequacy of the proposed facilities from an engineering standpoint, as to the reasonableness of Northern's construction cost estimates, or as to its ability to finance the project. And the Commission found the gas supply adequate, although petitioners did not raise the issue (R. 367–370).

[6] In its opinion the Commission said: "The question therefore arises as to whether the revenues to be obtained from the contemplated new service will be great enough to offset the costs associated with the construction of the branch lines and meter-

Northern had supported its applications for certificates with estimates of revenues from the new service at the rates it was currently charging its present customers. Those rates were the ones then being charged pursuant to a rate increase filed May 27, 1958, and pending at the time of the hearing.[7] Northern presented evidence to show that, with those revenues, and the added costs of providing the new services, the expanded system *as a whole* would yield, in the third year of the new services, in excess of the 6½% rate of return which the rates were intended to produce.[8] Supporting exhibits were presented by Commission staff witnesses, without objection by petitioners.[9]

The Commission accepted Northern's estimates showing *system-wide* revenues after expansion in excess of a 6½% rate of return, recognizing at the same time that "the rate of return on the *incremental* facil-

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ing stations necessary for rendering service to the proposed communities so as to avoid placing the burden of the cost of the new facilities upon Northern's existing customers" (R. 375).

[7] *Northern Natural Gas Company*, Docket No. G-15335. Those rates were in effect, subject to refund if not ultimately justified, from November 27, 1958 (R. 83) until December 27, 1959, when the Commission's suspension of the next increased rate, filed June 26, 1959, expired (Pet. 6).

[8] Exhibits 9, 49, 50, 57, 161, 170, and 171 (R. 149, 253, 254, 264–265, 276 and 277).

[9] Exhibits 180 and 181 (R. 150–156, 238–242, 297–299). The Commission exhibits used a 6% rate of return solely for illustrative purposes (R. 239), which conforms to the usual Commission practice. However, adjustment of the prices to produce a specified change in intended rate of return on the *present system* would cause the use of those adjusted prices to produce the same change in the *expanded system* rate of return, because of the sufficiency of present system profits to offset the lower rate of profits on the new services.

ities * * * will be somewhat short of this, but will still represent a substantial return on its investment" (emphasis added).[10] The Commission concluded that the project was economically feasible (R. 374); but to "enhance" the feasibility it required capital contributions by certain of the communities, which contributions improved the return on the incremental facilities (R. 377–378).

Petitioners objected on the ground that the contributions required were insufficient to make the *incremental* facilities what they considered to be "economically feasible", *i.e.*, productive of as high a rate of return on investment as the existing system.[11] Thus, the Commission was looking to *system-wide* revenues, as it should, while petitioners were looking only to *incremental* revenues. Both the Commission (R. 379, 408–409) and the court below (Pet. 16) correctly held that the various parts of a utility system need not and cannot be equally profitable. It has long been settled that all that is required is that the over-all operations be sufficient to give the net returns to which the utility is entitled. *Puget Sound Traction, Light*

[10] R. 373–374; Ex. 162 (R. 266) showed an *incremental* return on the facilities in Docket No. G–17485 of 5.66%, and Exhibit 172 (R. 278), an *incremental* return on the facilities in Docket No. G–17486 of 4.20%.

[11] It is pertinent to note what was petitioners' real concern in this case, which did not escape the notice of the court below. In its opinion, the court said: "[Petitioners] object to the Commission's orders because, on the basis of the rates now charged Northern's customers, *the new service* will not yield to Northern in the first three years as high a percentage of profit as the present service, and may therefore tend *to keep up* the rates which petitioners pay to Northern" (Pet. 15–16; emphasis added).

and Power Co. v. *Reynolds*, 244 U.S. 574, 580–581; *St. Louis and San Francisco Railway Co.* v. *Gill*, 156 U.S. 649, 665–666. In these circumstances, the Commission did not merely assume an excess of revenues over the cost of service on the expanded system in the third year, as petitioners would have this Court believe (Pet. 2). The record fully supported it.

2. To escape from the unequivocal holding of the court below that the record supports the Commission's findings, petitioners now contend that the Commission should have determined economic feasibility in the light of the estimated costs Northern used to support its rate increase application of June 26, 1959, and that the court below should have remanded the proceedings for further hearings when petitioners raised that objection.

Petitioners assert that of the $10,000,000 increase requested in the rate filing of June 26, 1959, "About 1.5 million dollars of the increase was to cover Northern's claimed rate of return of 6¾% rather than 6½%; the balance of 8.5 million dollars was to cover Northern's claimed increases in its cost of gas" (Pet. Rep. Br. in the court of appeals, p. 6, fn. 4). But neither of those factors was material to the resolution of the issues before the Commission in the certificate proceedings.

In the first place, the rates which the Commission used to arrive at Northern's estimated revenues were intended to yield a 6½% rate of return rather than a 6¾% rate; and that they would do so on a system-wide, or "rolled-in", basis during the third year of operation of the expanded system, was demonstrated.

Northern's new claim that it is entitled to a 6¾% return instead of 6½% has nothing whatever to do with the economic feasibility of the proposed project.

Moreover, since the exhibits presented by Northern to justify the expansion were based upon currently effective rates, they likewise properly reflected the estimated cost of service on which those rates were based, instead of the estimated higher future purchased-gas costs on which the last increased rates were based. Petitioners concede (Pet. 4) that "Northern is entitled under existing Commission precedents to recover its entire cost of service in its rates." It follows therefore that, if Northern is entitled to higher rates by reason of the prospective increase in its cost of purchased gas, such rates would be applicable to the entire system as expanded; and petitioners cannot, as they attempt to do, ignore this fact and look only to the increased gas costs. Stated otherwise, any consideration of the last increase application in determining the economic feasibility of the project requires an entirely new revenue-cost picture. Consequently, petitioners' argument that the Commission should have used the estimated higher future purchased-gas costs with the estimated revenues based on the currently effective rates is fallacious. What revenues, on the expanded system as a whole in the third year of operation, may be forthcoming from rates designed to recover new gas costs cannot at this time be determined, particularly in view of anticipated further expansion in markets. But in light of the foregoing, the figures upon which petitioners rely in

no way show that the Commission's approval of the expansion project will place any "undue financial burden" upon petitioners.

3. In any event, petitioners may not now raise the objection which they present. Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), provides in part:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

Petitioners do not maintain, as they cannot, that they ever presented this objection to the Commission. Instead, they assert that they could not, on the ground that it was not until the Commission filed its answering brief in the court below that they had any knowledge of a claim that Northern's system-wide revenues from jurisdictional services after expansion would exceed its costs of service, including a 6½% return, by approximately $1,500,000. The $1,500,000 excess is not in itself significant. So long as Northern's system-wide revenues after expansion would exceed its cost of service, including a 6½% rate of return, by any amount, the project was economically feasible. In its brief in the lower court, the Commission did no more than make certain mathematical computations from the exhibits already in evidence to show the $1,500,000 excess. There was no reason why petitioners could not have made the same calculations. At the same time and from the same sources, petitioners were well aware of the cost figures which were

being used."[12] Likewise they were fully cognizant, at least by the time of oral argument to the Commission on July 17, 1959, that Northern had filed the rate increase application in Docket No. G-19040. Yet they did not maintain, or even indicate, in their application for rehearing before the Commission that the Commission should consider the costs as estimated in the new rate increase filing. In their application for rehearing which was filed on August 27, 1959 (R. 351), approximately four weeks after the Commission's opinion and order of July 31, 1959, and about nine weeks after Northern's application for the rate increase, petitioners challenged the Commission's order upon grounds which went solely to matters of record in the certificate proceeding (R. 336–351). Moreover, in their petition for review in the court below they did not present their current objection (R. 2–12). When, thereafter, they raised the question for the first time in their reply brief in the court of appeals, it came too late. The statutory bar precludes entertainment of their objection. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 157; *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497–500; *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 645, 649, 650.

[12] Petitioners "participated in the hearings, cross-examined witnesses, presented evidence, filed briefs and argued orally before [the Commission]" (R. 7).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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